

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of BLEECKER
CHARLES CO.,

Petitioner,

For the Inspection of the Minutes of Meetings of
the Directors and Shareholders and Record of
Shareholders of 350 Bleecker Street Apartment
Corp.

-against-

350 BLEECKER STREET APARTMENT
CORP.,

Respondent.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Index No. 110835/02

I.A.S. Part 11
Hon. Joan A. Madden

**AFFIDAVIT OF KENNETH B.
NEWMAN**

KENNETH B. NEWMAN, being duly sworn, states:

1. I am a partner of petitioner Bleecker Charles Co. authorized to conduct partnership business pursuant to § 75 of the N.Y. Partnership Law. Bleecker Charles was the sponsor of the cooperative conversion of the residential apartment building located at 350 Bleecker Street, now owned by respondent 350 Bleecker Street Apartment Corp. Bleecker Charles holds 23.5% of the shares of respondent.

2. I submit this affidavit in support of the application of Bleecker Charles for judgment directing respondent to allow me to inspect and copy the current list of

shareholders and unredacted minutes of Board and shareholders' meetings from September 22, 1999 to the present.

3. As set forth below and in the accompanying memorandum of law, Bleecker Charles is statutorily entitled to a copy of the current shareholder list in electronic format, and complete and unredacted copies of the minutes of all shareholders' meetings for the requested period. Respondent's sole basis for opposing my request for these items is that I am only entitled to "review" these items and *hand copy* the shareholder list in the attorney's office.

4. As alleged in the Petition (¶ 8), Bleecker Charles is required pursuant to 13 NYCRR § 18.5(a)(8) to serve an amended offering plan on all shareholders and residents. Without the current shareholder list (in usable electronic form), Bleecker Charles is unable to fulfill its regulatory obligations.

5. In addition, Bleecker Charles has a common law right to copies of the complete and unredacted minutes of meetings of respondent's Board of Directors. Contrary to respondent's contention, and as set forth in detail below, my request for this information is for a proper purpose and is made in good faith. Accordingly, the relief requested in the Petition should be granted in its entirety.

6. I seek copies of the unredacted Board minutes for several reasons. It has come to my attention that the current Board of Directors of the co-op has concealed

material events from the shareholders, including but not limited to developments in the recent litigation between the co-op and Bleecker Charles. To the extent the Board has made disclosures to the shareholders concerning that litigation, its disclosures have been misleading and incomplete, and infected with personal animus against me. I have a legitimate interest in communicating with the other shareholders concerning the litigation, the Board's conduct and the Board's representations about me. For the purpose of identifying the Board's misrepresentations and concealments, I am entitled to the complete and unredacted minutes of Board meetings.

7. In addition, as a holder of approximately 23% of the shares of the corporation, the Board owes Bleecker Charles a fiduciary duty. I believe that the Board may have breached its fiduciary duties to Bleecker Charles and the other shareholders by pursuing a futile and expensive litigation, and refusing to accept a reasonable settlement proposal, against the advice of counsel. I specifically wish to review the portions of the Board minutes reflecting counsel's advice to make that assessment.

8. As respondent has acknowledged, in October 2001, Bleecker Charles prevailed in a declaratory judgment action against the co-op in the United States District Court of the Southern District of New York declaring that the co-op's attempt to terminate Bleecker Charles' lease of the parking garage was untimely (the "Garage Lease litigation"). A copy of the decision, dated October 4, 2001, is annexed hereto as Exhibit I.

9. In response to shareholder complaints about the late disclosure, the Board promptly disclosed the district court's additional decision dated April 10, 2002 awarding me a judgment in the amount of \$344,516.18 for the costs of bringing suit, including attorneys' fees. (See Exhibit B to the Affidavit of Mark Lilien, sworn to June 10, 2002, submitted in opposition to the Petition ("Lilien Aff.")). (A copy of the April 10, 2002 decision is annexed hereto as Exhibit 2.) However, when the district court issued an amended order on April 12, 2002 increasing the amount of the fee award to \$366,908.20, the Board concealed this development from the shareholders for six weeks, not disclosing it until May 31, 2002. (The Newsletter dated May 31, 2002 was inexplicably omitted from the other Newsletters annexed as Exhibit B to the Lilien Aff. A copy is annexed hereto as Exhibit 3.)

10. In the Newsletter dated April 11, 2002 (Lilien Ex. B), the Board advised shareholders that it was considering taking a \$500,000 bank loan at 6% interest to satisfy the judgment in my favor. The co-op paid the judgment on May 10, 2002, but did not advise the shareholders either that it had made the payment or where it had obtained the necessary funds. In the May 31, 2002 Newsletter, the Board made the shocking disclosure that it had accepted interest-free personal loans from the seven Board members in the aggregate amount of 200,000, instead of the previously-announced bank loan. This highly irregular transaction was not disclosed to the shareholders until May 31, 2002, *three weeks after the judgment was paid.* (See Ex. 3.)

11. It further appears that the \$366,908.20 legal fee expense is not reflected on the financial statement published to shareholders as of May 31, 2002. (See Exhibit 3.) None of the categories of expenses disclosed on the financial statement encompasses payment of legal fees, and none of the listed amounts is large enough to include a \$366,908.20 expense. This material omission renders these financial statements false and misleading. Instead of net operating income in the amount of \$28,319 for the period January through March 2002, the corporation actually sustained a net operating loss in excess of \$300,000.

12. At some point between January 28 and March 17, 2002, Keith Hutchinson resigned from the Board creating a vacancy. The shareholders were not advised of the vacancy until March 17, 2002. According to the May 31 Newsletter, Greg Colucci was appointed by the Board on an unspecified date to fill the vacancy. (See Ex. 3.)

13. The commencement of this proceeding, which triggered notification of the co-op's D&O insurance coverage and retention of counsel, has not been disclosed to date. (See Ex. 3)

14. I am also aware that Steven Hanley, another shareholder in the co-op, has commenced a disciplinary proceeding against the co-op's accountants alleging professional malpractice in connection with preparing the co-op's financial statements. To date, the existence of this complaint has not been disclosed to the shareholders.

15. Indeed, the Board evidently held four meetings on April 11, April 30, May 7 and May 28 without making a single report to the shareholders until May 31. (See

Ex. 13.) The timing of the overdue May 31 Newsletter suspiciously coincides with the commencement of this proceeding. The Order to Show Cause was served on respondent on May 29, 2002.

16. It is also clear that the Board's communications with the shareholders concerning the Garage Lease litigation or other matters pertaining to me are rife with personal animus and a lack of objectivity. I should be entitled to respond. The Board is not entitled to an exclusive right to communicate with the shareholders about these matters, particularly where, as here, it has an obvious bias.

17. The Board's lack of openness is further illustrated by its willful failure to comply with my legitimate requests for information. As alleged in the Petition (§ 7) and nowhere denied by respondent, I made repeated requests for copies of the current shareholder list and Board and shareholder minutes. I sent emails to the Board President, Susan Kim, on October 9, 11, 15, 17 and 19. (A copy of my first email is annexed as Exhibit A to the Petition.) These requests were simply ignored until Mark Lilien advised me that the Board would not respond to my requests until I had submitted an affidavit in accordance with BCL § 624. I submitted the affidavit to all Board members by hand delivery on October 30, 2001. (A copy of my transmittal letter and the accompanying affidavit are annexed as Exhibit B to the Petition.)

18. On November 5, 2001, Mr. Brucker, in his capacity as counsel for the co-op, advised me that the co-op intended to redact sensitive information from the minutes

before making them available to me. He did not respond to my request for the shareholder list. (*See Lilien Aff. Ex. D.*) However, on the same day, Mr. Lilien advised me by telephone that the managing agent, Tudor Realty, would turn over the shareholder list upon my request, and that I should speak with Paul Morton. I called Tudor Realty and left a detailed message for Mr. Morton, who did not return my call until November 8, at which time he advised me to speak with Mr. Brucker.

19. On November 6, 2001, I reiterated my request for copies of the minutes and shareholder list, in writing, to Mr. Brucker. He responded on November 9, acknowledging that "I told [the Board] to make the [shareholder] list available to you (as is your right as a shareholder, and this is true whether you are the attorney for, or a principal of, the Sponsor)." (*See Lilien Ex. E.*)

20. On November 9, I reiterated my request for a copy of the shareholder list, which had been promised to me earlier in the week by Mr. Lilien. (*See* letter dated November 9, 2001 annexed hereto as Exhibit 4.) I also expressly informed Mr. Brucker that the purpose of my request for copies of the Board minutes was to investigate the conduct of the Board and communicate my findings to the other shareholders. "The interest of the shareholders is paramount and best served by the truth unhampered by impediments to full disclosure and open communications among all parties." (*Id.*)

21. On November 13, the day of Board elections, Mr. Brucker finally advised me that the redacted minutes were available for my "review" in his office. (*See*

Lilien Ex. F.) I responded that day, objecting to the evidently strategic nature of the delay, which appeared to be designed to impair my ability to prepare a statement for that evening's elections. (See Lilien Ex. G.) I further objected that the shareholder list had still not been furnished. I specifically requested an electronic copy of the list, which had been provided by the Board secretary to other shareholders at a nominal cost upon request. (*Id.*)

22. By email sent at 5:18 p.m. on November 13, 2001, Mr. Brucker advised me that "the law does not require the corporation to turn over the [shareholder] list. Rather it simply requires that the list be made available so that the shareholder can make an abstract therefrom." (See Lilien Ex. H.) As set forth in the accompanying memorandum of law, this statement is in direct contravention of the plain statutory language.

23. On November 14, 2001, Mr. Brucker advised me that both the shareholder list and redacted minutes were available for my "inspection" in his office. (See Lilien Aff. Ex. I.) After I reiterated my original request for copies of the minutes and shareholder list (in electronic format) by letter dated November 16, 2001 (Lilien Aff. Ex. J), Mr. Brucker responded that "in the event [I was] not pleased with the action of the corporation, [I] should go to the court to compel the corporation to produce corporate documents." (See Lilien Aff. Ex. K.) Respondent's position clearly indicated that further requests would have been futile.

24. To date, I have *never* been offered the documents to which I am entitled under BCL § 624. Respondent only offered me an opportunity to "review" or "inspect" the

shareholder list and redacted minutes in the offices of its attorney. The plain statutory language entitles me to copies of these materials in all formats in which they are maintained by the co-op. As alleged in the Petition (¶ 7) and nowhere denied by respondent, the co-op maintains the shareholder list and minutes in electronic format. Accordingly, I am entitled to receive copies of these materials electronically.

25. I was not required to accept respondent's offer of a mere "review." With respect to the shareholder list, a "review" would have required me to hand copy the names and addresses of the owners and residents of 137 units (many of which have more than one owner). Mr. Brucker specifically stated to me that I would be expected to copy the list by hand. The reason the statute entitles me to a copy of the electronic version of the shareholder list is to prevent precisely this type of bad faith gamesmanship by the corporation that wishes to prevent me from communicating with the other shareholders.

26. Similarly, I was never offered copies of the Board and shareholder minutes, but only an opportunity to review them in the offices of the co-op's attorney. As set forth above, Bleecker Charles' ability to communicate effectively with the shareholders concerning the pattern of concealment and misstatement engaged in by the current Board would be impaired if I am not permitted to retain copies of the minutes.

27. I was also entitled to reject respondent's offer to mail copies of the amended offering plan to the shareholders at Bleecker Charles' expense. As set forth in the accompanying Memorandum of Law, the co-op is not entitled to dictate how or on what

terms a shareholder may communicate with the other shareholders. More significantly, Bleecker Charles is required pursuant to 13 NYCRR § 18.1(e)(4) to certify that I served the amended offering plan on everyone entitled to receive it. I should not be compelled to rely on a representation by the Board or its managing agent that service was properly and timely effected particularly in light of the ample grounds, discussed above, for mistrust of the current Board.

28. Contrary to respondent's contention, I am obligated to review all relevant information, including Board minutes, in order to make all required disclosures in connection with the amended offering plan. 13 NYCRR § 18.5. Without access to the Board minutes, I have no alternative but to gather the necessary information from less reliable sources. I advised Andrew Brucker, Esq., counsel for the co-op, of this basis for my request, in January 2002.

29. For example, my efforts to determine the identities of the current members of the Board have been frustrated by the Board's failure to disclose the resignation of Mr. Hutchinson and the resulting vacancy, and the filling of that vacancy on an unspecified date. As a result of the difficulty in compiling and confirming this and other information necessary in connection with the amended offering plan, the amendment was not delivered to the Attorney General until May 22, 2002.

30. In the event my review of the Board minutes reveals additional material facts, I will be required to further amend the offering plan. To avoid unnecessary expense,

and in fairness, I should be permitted to receive the unredacted minutes, and make any necessary amendments, before the amended offering plan is mailed.

31. Respondent's primary opposition to this Petition appears to be based on the fact that although respondent last refused my legitimate requests for information in November 2001, this Petition was filed in May 2002. I had several reasons for the timing of the Petition, as well as my initial request for copies of the minutes and shareholder list. When the district court issued its decision in the Garage Lease litigation on October 3, 2001, it appeared that there was no longer any possibility of any litigation advantage from my review of the minutes. That is why I made my first request for copies of the minutes and shareholder list on October 9, 2001. Respondent filed an appeal on November 2, 2001. The appeal was fully briefed on April 8, 2002. Given the procedural posture of the appeal, respondent can no longer reasonably contend that I would receive any litigation advantage from review of the Board minutes at this time.

32. Respondent's delay in providing the minutes and shareholder list, and the resulting delay in service of the amended offering plan, are preventing the sale of vacant apartments held by Bleecker Charles. The Court of Appeals has just ruled that a sponsor is obligated to sell its apartments within a reasonable time of the cooperative conversion. One of the sponsor's units is currently vacant but cannot be sold until service of the amended offering plan. Every day that Bleecker Charles is prevented from selling the apartment gives rise to damages in the amount of the maintenance charges paid for the vacant apartment and.

in this uncertain real estate market, the risk that the market value of the apartment will drop before Bleecker Charles is able to sell.

33. The statute does not require any prior notice of petitioner's intention to file a petition seeking the requested relief. Respondent's refusal is the only prerequisite. In this case, respondent stonewalled, delayed, refused my repeated requests and told me that if I were not satisfied with a mere "review," I should seek judicial intervention. Another request in advance of the filing of this Petition would have been futile.

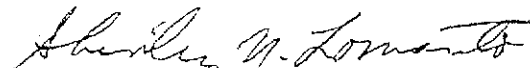
34. As respondents concede (Lilien Aff. ¶ 7), I have not served on the Board since November 1999. The last Board minutes in my possession are dated September 22, 1999. If I received any more recent Board minutes in my former capacity as managing agent for the co-op (as alleged by Mr. Lilien in note 3 of his affidavit), I must have tendered those minutes to Tudor Realty, the current managing agent, when my contract terminated.

Accordingly, I seek copies of all Board and shareholders' minutes dated after September 22, 1999 and the current shareholder list, in electronic form.



KENNETH B. NEWMAN

Sworn to before me this
12th day of June, 2002



Notary Public

SHIRLEY N. LOMANTO
NOTARY PUBLIC, State of New York
No. 30-4789082
Qualified in Nassau County
Commission Expires May 31, 192003